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BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION P7-03

PETITION OF OCEAN WORLD LINES, INC. FOR A RULEMAKING TO AMEND AND EXPAND THE DEFINITION AND SCOPE OF "SPECIAL CONTRACTS" TO INCLUDE ALL OCEAN TRANSPORTATION INTERMEDIARIES

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I. INTRODUCTION

Ocean World Lines, Inc. ("OWL"), by its attorneys, files this petition for the issuance of a rule pursuant to section 502.5 1 of the Commission's Rules of Practice and Procedure (the "OWL Petition"). OWL seeks a rulemaking proceeding to address and evaluate the continuing impact of the Commission's rules governing Ocean Transportation Intermediaries ("OTIs"), the majority of which have been in place and have remained unchanged since 1949, on the customs and practices of OTIs in the 21st century. Specifically, OWL seeks a rulemaking that would expand the definition and scope of the term "special contracts" to include all OTIs in the same manner as currently applied to ocean freight forwarders (46 C.F.R. §§ 512.2(u), 515.41(c)).

The requested rulemaking seeks industry-wide participation in a review of those rules because OTIs have evolved since 1949 from an industry that focused solely on the movement of cargo by water in the foreign commerce of the United States into one that provides complex multinational, multimodal logistics services of which the ocean-going movement of the cargo is but a single component. Regulations created in 1949 cannot accurately reflect the commercial environment under which OTIs operate in 2003.

A revision of these rules is needed to redress the competitive dysfunction in the marketplace caused by the inability of NVOCC-OTIs to shield the ocean transportation component of their ocean rate offerings from scrutiny by their VOCC and OTI competitors, and the further inability of those OTIs to memorialize one component of their range of services into contracts or other similar agreements despite the fact that all other services performed by the OTI along the supply chain may be so memorialized. More importantly, the NVOCC and its shipper is not able to shield a component of its landed costs from the NVOCC's or the shipper's competitors.

The OWL Petition is filed in response to the Petitions for Exemption filed by UPS (Service Contract Exemption P3-03) and by the National Customs Brokers and Forwarders Association of America, Inc (Tariff Filing Exemption P5-03). Both petitions seek to utilize the exemption authority of the Commission to redress the competitive harm caused to NVOCCs by an existing regulatory structure that prohibits NVOCCs from entering into confidential rate agreements (whether by the use of confidential contract or other mechanisms) and requires that all NVOCC rate offerings be published in publicly available tariffs.

OWL supports, with some reservations, the underlying purpose of both the UPS and NCBFA Petitions and would be pleased if the Commission acted favorably on either or both exemption requests.[1] However, the possibility exists that the Commission will not rule favorably on either or both petitions on the grounds that its statutory exemption authority does not extend to matters which Congress has addressed directly in its legislation or in the legislative history of the Shipping Act of 1984 Act, 48 U.S.C. app. 1701 et. seq., or as amended by the Ocean Shipping Reform Act of 1998 ("OSRA") (Public Law 105-258). As explained below, the special contracts provisions of the rules governing freight forwarders have been a creation purely of the rulemaking authority of the Commission and its predecessor, the Federal Maritime Board. The matter of special contracts has never, to OWL's knowledge, been the subject of any legislative scrutiny.

The underlying purpose behind the filing of the OWL Petition, therefore, is two-fold:

1. To provide the Commission with the regulatory ability to act on the issue of shielding some NVOCC rates even if it determines that its statutory exemption authority does not extend to those elements of the statutory regime that Congress addressed directly in OSRA; and, in so doing,

2. To provide NVOCCs with the ability to enter into rate agreements that are shielded from public view by their competitors without recourse to service

[1] OWL is preparing Comments in response to both petitions.

> contracts or a broad-ranging tariff exemption and to ameliorate the marketplace dysfunction caused by the transparent/opaque rate dichotomy that exists in the trade today.

A revision and expansion of the term “special contracts” can serve as a mechanism through which the Commission can address some of the competitive harm caused by this dichotomy without acting in areas in which Congress has paid direct and immediate attention.

II. IDENTITY AND INTEREST OF THE PETITIONER

OWL is an OTI (acting as an NVOCC) operating under a license issued by the Federal Maritime Commission. OWL is a subsidiary of Pacer International, Inc. (“Pacer”), one of the largest non-asset based logistics providers in North America. The Pacer group of companies provide, in addition to OWL’s ocean cargo services, stacktrain services (Pacer Stacktrain), intermodal marketing, trucking, warehouse & distribution, supply chain management services (Pacer Global Logistics), and freight forwarding and Customs House brokerage services (RF International, Ltd.).

The Pacer Stacktrain (purchased from the APL Group in 1999) maintains a fleet of more than 1,800 double stack rail cars, 21,000 containers and 23,000 chassis and is one of the largest non-railroad providers of inter-modal rail service in North America. Pacer Stacktrain provides APL Limited and other VOCCs with equipment repositioning services from destinations within North America to their West Coast points of origin. Pacer Stacktrain fills these containers and railcars with backhaul cargo with the westbound freight of its customers. In 2002, 2001, and 2000, Pacer Stacktrain tilled 76,104, 81,376, and 68,579 containers, respectively, with backhaul cargo for shipment via the Pacer rail network on behalf of domestic and international customers. In addition to providing double stack inter-modal rail service to intermodal marketing companies and other third party intermediaries, Pacer Global Logistics (“PGL”) offers an integrated portfolio of global transportation and supply chain services for small, medium, and large shippers and is one of the largest inter-modal marketing companies and one of the largest truck brokers in North America..[2] PGL currently provides retail services on a nationwide basis to retailers and manufacturers, including a number of Fortune 500 and multi-national companies such as Ford, General Electric, Heinz, Wal-Mart, Whirlpool, Union Pacific, and Sony. Other important Pacer customers include Disney, Bechtel, Sysco, Pepsi, Honda, International Paper, Butler Aviation, Owens Coming, and Continental Tire North America.

III. NATURE OF THE RELIEF DESIRED

OWL seeks relief from the marketplace dysfunction caused by the continuing requirement that NVOCCs operate in a wholly transparent rate environment while VOCCs, since OSRA, may now operate in an opaque rate setting environment.[3] This disparate treatment has had, and continues to have, a deleterious impact on the NVOCC's ability to secure and retain underlying shipper cargo.

As is well known, VOCCs compete with other VOCCs for cargo. VOCCs also compete with NVOCCs for cargo. NVOCCs, in turn, compete for cargo with other NVOCCs and VOCCs. During the period between the enactment of the 1984 Act and OSRA, both VOCC and NVOCC rate filings, even VOCC service contracts, were transparent and publicly available. NVOCCs were able to enter into service contracts with VOCCs and, in addition, were able to 'me-too' service contracts for which they were deemed similarly situated. The essential terms of these contracts and the tariff rates offered by NVOCCs were all transparent.

[2] OWL, and its freight forwarding affiliate, RF International, are integral components of PGL.

[3] VOCCs are still required to maintain tariffs. However, as ever greater potions of cargo move via service contracts, the VOCC tariffs most useful remaining function is that of a rate-signaling mechanism that enables VOCCs to publish and maintain visible retail rates for commodities in various trade lanes. Voluntary service contract guidelines utilized by discussion agreements, for example, are typically set out as deductions from the published tariff (retail) rate.

Although imperfect in the sense that the industry was still highly regulated, the mutual transparency provided balance as far as the knowledge of your competitors' rates were concerned. Thus, the regulatory structure provided a certain balance with regard to rate knowledge.

Since implementation of OSRA, NVOCC rates have remained entirely transparent while VOCC confidential service contract rates, which constitute the vast majority of their shipments, are now shielded from public view. What was once a level playing field of knowledge is now imbalanced in favor of VOCCs.

It is this dichotomy between the transparent rates of NVOCCs and the opaque rate offerings of VOCCs and not the ability, vel *non*, to enter into service contacts, that causes NVOCCs the greatest commercial harm.[4] To make use of a comparison to poker, OWL and all other NVOCCs are obligated to compete in the marketplace with nothing but up cards while VOCCs, already operating with antitrust immunity and the benefits of vessel-sharing, slot charters, and discussion agreements, are allowed to keep their cards face down.

The transparency of NVOCC tariff rates encourages the following VOCC practices: it facilitates and encourages back-solicitation by VOCCs of NVOCC shipper clients;[5] and it places upward pressure, unwarranted by purely commercial factors, on both VOCC/NVOCC and VOCC/shipper rate levels.

The facilitation of back-solicitation and upward pressure on rate levels are inter-related and may be attributable directly to the transparency of NVOCC tariff rates. A hypothetical example is perhaps the best way to explain the process. OWL enters into a 10,000 TEU service

[4] Confidential service contracts are merely the tool through which this imbalance of knowledge is maintained.
[5] Back-selling is the process by which VOCCs identify NVOCC clients that put cargo on the VOCC's vessel via the VOCC/NVOCC service contract once it becomes apparent that the underlying shipper has sufficient volume to warrant the VOCC's direct attention.

contract with a VOCC in the North Atlantic trade for a range of commodities at an average rate of $1,600 per TEU. The average VOCC tariff (retail) rate for the commodities in question is $1,900 per TEU. OWL, in turn, files tariff rates for its shippers of $1750 per TEU. OWL's margin on each shipment is $150 and the underlying shipper gets a rate that is $150 less than the VOCC "retail" tariff rate. One of OWL's largest shippers moves about 1000 TEUs with OWL under the VOCC/OWL service contract. Once the underlying VOCC becomes aware of that shipper's volume (it is not all that hard to do), it can do one of three things.

First, the VOCC can choose to do nothing if the volume of that beneficial shipper's business does not warrant the VOCC's attention. Second, the VOCC can approach the underlying shipper directly and seek to obtain its own direct service contract either during or after the expiration of the VOCC/OWL service contract. Given the VOCC's knowledge of the OWL/shipper rate it can enter into negotiation with the shipper with perfect knowledge of its bargaining parameters. It can undercut the NVOCC's rate by $50 per TEU or even $150 per TEU without losing any revenue per box. [6]

Finally, if the VOCC determines in its own estimation that OWL's margins under the service contract are too great it has the ability to base subsequent service contract negotiations with complete knowledge of OWL's margins. It can price its next service contract in such a way as to eliminate or reduce significantly OWL's margins. In that way, the VOCC can procure

[6] If the shipper is induced to enter into a service contract directly with the VOCC during the course of the VOCC/NVOCC service contract the NVOCC will be faced with the prospect that it might not fulfill its minimum volume commitment ("MVC"). If the NVOCC has trouble meeting its MVC, it may not be able to obtain a new service contract for the same volume and might be obligated to enter into a smaller-volume service contract in the future. Small volume contracts generate higher rate levels per TEU for VOCCs and serve to compress further the NVOCC's margins and its ability to attract or retain business. OWL is not complaining about back solicitation *per se*, nor does it allege that it is an unreasonable or unlawful practice. OWL's complaint lies with a regulatory regime that provides one segment of the industry with an additional competitive tool unrelated to commercial or market-driven consideration. This regulatory facilitated advantage warrants particular flexibility on the part of the Commission in addressing this competitive pressure.

eventually OWL's underlying shipper business at OWL's sell rate to the shipper rather than its own, lower, sell rate to OWL.

The same issues arise when another VOCC identifies attractive beneficial shipper cargo moving under another VOCC's service contract with an NVOCC. The VOCC can readily identify the NVOCC sell rate simply by reference to the NVOCC tariff. Further, given the relatively stringent adherence of discussion groups to 'voluntary' service contract guidelines, the VOCC can also determine with a reasonable degree of accuracy the rate levels contained in the VOCC/NVOCC service contract.

NVOCC rate transparency enables VOCCs to bid higher for beneficial shipper business being shipped with NVOCCs than they would if NVOCC rates were not transparent. As long as NVOCC rates remain entirely transparent, VOCCs can, and do, negotiate down from the NVOCC retail sell-rate rather than up from the VOCC's wholesale sell rate or its minimum revenue per TEU requirement.[7] In either case, the shipping public ends up paying higher rates than might otherwise be obtained if NVOCC rates were not entirely transparent. Again, OWL does not object to the fact that VOCCs, or even other NVOCCs for that matter, utilize all legitimate means at their disposal for competitive advantage. That is what we are supposed to do in the marketplace. OWL is of the opinion, however, that a regulatory regime that facilitates different knowledge levels amongst competitors cannot be one viewed as advancing a truly competitive marketplace.

IV. PETITION FOR RULEMAKING

As is clear from the discussion below, the term 'special contracts' is an anachronistic term created over fifty-four years ago. Nevertheless, OWL believes that this anachronistic term

[7] A VOCC should be aware, with a reasonable degree of certainty, of the minimum revenue each TEU should generate, taking into account their fixed and incremental costs, and projected capacity in any given trade lane in.

can be used as a mechanism through which the Commission can act to reduce some of the competitive harm caused to OTIs by the transparent/opaque rate dichotomy.

OWL's Petition may be viewed as something of a compromise proposal. OWL does not seek 'service contract' rights as that term is defined by the 1984 Act and OSRA. OWL does not seek an exemption from the tariff filing requirements of the 1916 Act, the 1984 Act, and OSRA. Rather, OWL seeks the ability, on behalf of itself and all other NVOCCs, to shield some of its rate offerings from its VOCC and NVOCC competitors. A revision to the term "special contracts" may serve as the vehicle through which OWL's goals may be accomplished.

OWL also understands that the referenced term "special contracts" is known by few in the industry and likewise it may be helpful to preface its proposal with a brief history of the creation and use of the term.

A. THE TERM "SPECIAL CONTRACT" IS A PURELY REGULATORY CONCEPT AND A REVISION TO THE RULES GOVERNING SPECIAL CONTRACTS WILL NOT CONFLICT WITH ANY LEGISLATIVE MANDATE OR HISTORY

The term "special contracts" as it applies to freight forwarders has been in use by the Commission and its predecessor the Federal Maritime Board ("Board") since 1949. The term was first used by the Board in 1949 when it issued the first set of rules governing the conduct of freight forwarders in General Order 72. General Order 72 was issued subsequent to the findings of the Board at the conclusion of a seven-year long investigation into the general practices of the forwarding industry. *See New York Freight Forwarder Investigation,* 3 U.S.M.C. 157 (FMB 1949). During the course of that investigation the authority of the Board to regulate freight forwarders was subjected to a court challenge. The Supreme Court, in *American Union Transport v. United States,* 327 U.S. 437, 66 S.Ct. 644, 90 L.Ed. 772 (1946), ruled in favor of the

Board, the investigation was concluded, and the Board subsequently found that there was a need to require the registration of all forwarders in the United States.[8] It also concluded that it would "promulgate rules and regulations relating to their practices and relations with shippers and consignees." *New York Freight Forwarder Investigation, 3* U.S.M.C. at 165. The Commission's Notice of Proposed Rulemaking was annexed to its ruling on the freight forwarder investigation. *Id.*

Section 3.3 of the proposed rule stated that "[a]ll special contracts between forwarders and shippers or consignees shall be reduced to writing, signed by the parties, and a copy maintained in the files of the forwarder for submission to the Commission upon request." *Id. at* 167.

Section 3.4 of the proposed rule stated that "[t]o the extent that special contracts are entered into by forwarders with individual shippers or consignees, similar contracts shall be open to all shippers and consignees similarly situated, and they shall be advised as to the terms under which the contracts are available." *Id.*[9] Final rules were issued subsequent to the issuance of the Notice of Proposed Rulemaking. The rules were set out initially in 46 C.F.R. Part 244. The rules were issued solely under the authority of the Board to regulate "other persons subject to this Act within the meaning of section one of the Shipping Act of 1916" absent any express legislative direction.

In 1954, the Board instituted another general investigation into the practices of ocean freight forwarders by order dated October 6, 1954, with a view towards amending or otherwise supplementing General Order 72. *Investigation of Practices, Operations, Actions, and*

[8] Licensing was not required until 196 1.
[9] This marks the entrance of the term "similarly situated shipper" into the maritime regulatory lexicon. It is OWL's understanding that the term was first used earlier in the century by the then Interstate Commerce Commission in relation to rail shippers.

Agreements of Ocean Freight Forwarders and Related Matters and Proposed Revision of General Order 72 (Docket 765). Subsequently, in 1958, the Board launched a parallel investigation, *Investigation of Practices and Agreements of Common Carriers by Water in Connection with Payment of Brokerage or Other Fees to Ocean Freight Forwarders and Freight Brokers.* (Docket 831, 23 Fed. Reg. 278). After a lengthy investigation the Board consolidated the two dockets and published the results of its investigations (referred to collectively as "Freight Forwarder Investigation"). *Freight Forwarder Investigation,* 6 F.M.B. 327 (June 29, 1961). The Board decided to prohibit forwarders from charging non-compensatory fees for forwarding services and also to prohibit the payment of freight forwarder compensation by carriers to forwarders. *Id.* at 366-367.

The Board concluded by publishing revised rules governing the business practices of freight forwarders. *Id.* at 368. Despite extensive revisions to other sections of General Order 72, the provision for special contracts was not substantively changed.

Section 244.9 of General Order 72 now read:

> Special Contracts: All special agreements of contracts between freight forwarders and shippers or consignees shall be in writing and shall be filed with the Board within 10 days after they are signed." *Id.* at 371.

Section 244.11 now read:

> To the extent that special agreements or contracts are entered into by a freight forwarder with individual shippers or consignees, such freight forwarders shall not deny to other shippers or consignees similarly situated, and whose shipments are accepted by such freight forwarder, equal charges for forwarding and accessorial services to be rendered by the freight forwarder, insofar as such forwarding and accessorial services are similar to those performed for shippers or consignees holding special contracts. *Id.*

[10] Previously, the forwarder was simply required to maintain copies of any special contracts and make them available for review by the Board upon request.

The revised rules were never implemented. Subsequent to the Board's June 29, 1961 Order, the Board was reorganized and transformed from the Federal Maritime Board into the Federal Maritime Commission.[11] More importantly, the forwarding industry, responding to the pending regulatory prohibition on freight forwarder compensation, was able to convince Congress to take action to codify the status of freight forwarders and to provide for carrier compensation of freight forwarders. On September 19, 1961, prior to the effective date of the revised General Order 72, Congress enacted and President Kennedy signed into law the Freight Forwarder Law. Public Law 87-254 (75 Stat. 522). PL 87-254 was enacted to provide for the licensing of freight forwarders and to authorize carriers to compensate licensed forwarders if they performed certain specific forwarding services. On October 4, 196 1 the new Commission "cancelled General Order 72, Revised, since Congress had overruled the Board's ban on brokerage and [concluded that] new regulations based on 87-254 were necessary." *See Practices and Agreements of Common Carriers by Water, etc.* 7 F.M.C. 51, 53 (January 18, 1962.).

On December 21, 196 1, the Commission published proposed new rules governing the Licensing of Ocean Freight Forwarders. 26 Fed. Reg. 12252-12253. These rules were promulgated as FMC General Order 4.[12] Subsequently, on February 24, 1962, the Commission issued proposed rules governing the Practices of Licensed Independent Ocean Freight Forwarders, Ocean Freight Brokers, and Oceangoing Common Carriers. 27 Fed. Reg. 1775-1776.[13] The rules governing special contracts remained substantively unchanged from those promulgated under FMB General Order 72.

46 C.F.R. § 5 10.25 Special Contracts provided that:

[11] See sec. 302 of Reorganization Plan No. 7, H. Doc. 187, 87th Cong., 1st Sess.
[12] To be set out at 46 C.F.R. §§ 510.1 – 510.9
[13] To be set out at 46 C.F.R. §§ 510.20 – 510.27

> (a) a true copy of all existing special arrangements or contracts, including amendments, modifications and cancellations thereof, between a licensee and his principal shall be filed with the Commission within 30 days after the effective date of this subpart; and, if oral, shall be confirmed in writing and a true copy shall be tiled with the Commission within such time. All future arrangements, contracts, amendments, modifications, or cancellations shall be filed within ten days after they have been entered into.
> (b) To the extent that special arrangements or contracts are entered into by a licensee, such licensee shall not deny terms to others similarly situated.

27 Fed. Reg. 1776.

The Commission, in response to various comments concerning the proposed rules, issued a revised set of proposed rules on January 3, 1963. See 28 Fed. Reg. 911. The rules governing special contracts were not affected by the revisions. Final Rules were issued on April 2, 1963 and became effective on June 1, 1963. See 28 Fed. Reg. 4300. The final rules governing special contracts remained unchanged.[14]

The rules were not revised again until May 1, 1981, when the Commission issued a final rule revising General Order 4. 46 Fed. Reg.24565 (May 1, 198 1). In explaining the need for revised rules the Commission indicated that "ocean freight forwarders, oceangoing common carriers and the Commission have agreed that General Order 4 needs to be substantially revised. The Commission also wishes to minimize its regulation of this business activity, to the extent its statutory duties permit." *Id.* The revisions focused on "a requirement for the licensing of separately incorporated branch offices, increased bond amounts to cover branch office operations, establishment of a minimum period of experience for qualifying individuals, elimination of the so-called pay over rule, an increase in fees for licenses, and new anti-rebate certification requirements." *Id.*

[14] There was a court challenge to some of the final rules that delayed their implementation beyond the June 1, 1963 deadline. 28 Fed. Reg. 5576-5577 (May 28, 1963).

The provisions concerning special contracts remained unchanged although special contracts were no longer required to be filed with the Commission. Instead, as part of their regulatory record-keeping requirements, forwarders were required to maintain copies of any special contracts and directed forwarders that "Commission personnel and bona fide shippers shall have access to such records upon reasonable request." 46 C.F.R. 510.34(d). As previously, the Commission directed that "to the extent that special arrangements or contracts are entered into by a licensee, the licensee shall not deny equal terms to other shippers similarly situated." 46 C.F.R. § 5 10.32(h)(ii)(v)(iii)(i).

General Order 4 was revised subsequent to both the Shipping Act of 1984 and OSRA.[15] Neither the 1984 Act or OSRA addressed the issue of special contracts and the rules as they exist today remain unchanged since 198 1. In fact, the specific rules governing special contracts have remained virtually unchanged since 1949 and have never been subject, as evidenced above, to any specific legislation or discussion in the legislative history of any statutory acts or amendments since their original promulgation in 1949.

B. CURRENT REGULATORY STRUCTURE

The pertinent rules as they exist today are set out below:

§ 515.2 Definitions.

The terms used in this part are defined as follows:

(o) *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. . . .

(v) Special contract is a contract for freight forwarding services which provides for a periodic lump sum fee.

[15] See, e.g., 49 Fed. Reg. 36296 (Final Rules, September 14, 1984); 64 Fed. Reg. 11156 (Final Rule and Interim Final Rule March 8, 1999); 64 Fed. Reg. 23019 (Confirmation of Interim Final Rule and Correction, April 29, 1999).

§ 515.33 Records required to be kept.

. . . .

(d) *Special contracts.* A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract between a licensed freight forwarder and a principal, or modification or cancellation thereof. *Bona fide* shippers shall also have access to such records upon reasonable request.

Subpart E -- Freight Forwarding Fees and Compensation§ 515.41 Forwarder and principal; fees.

(c) *Special contracts.* To the extent that special arrangements or contracts are entered into by a licensed freight forwarder, the forwarder shall not deny equal terms to other shippers similarly situated.

As noted above, Congress has never actually addressed the issue of special contracts and the use and meaning of the term is the same today as in 1949. It goes without saying that the forwarding industry, the NVOCC industry, and the entire industry generally has changed beyond recognition since 1949. After fifty-four years, it is time for the Commission and the industry to take this rule and transform it into a mechanism by which the Commission can provide effective real-world regulation over a 21st century industry.

C. PROPOSED EXPANDED DEFINITION OF "SPECIAL CONTRACTS"

OWL has stated that the real issue causing the competitive dysfunction in the ocean container marketplace between VOCCs and NVOCCs and NVOCCs with each other is the transparent/opaque rate dichotomy that exists today. Confidential service contracts and the requirement that all NVOCC tariff rates must be published and freely available are merely the regulatory structure through which this dysfunction is able to flourish. Both the UPS and NCBFA Petitions seek redress for this dysfunction by seeking access to service contract rights or by seeking exemption from the Act's tariff publishing requirements.

Both Petitions would, if granted, achieve the same goal as that sought by OWL in the instant Petition. However, both Petitions seek relief in the form of exemptions from the statutory construct on matters that Congress has specifically addressed in 1984 and in 1998, *i.e.,* the continuing prohibition on NVOCC/shipper service contracts and the consequent and ongoing requirement that all NVOCC rate offerings be duly filed in their respective tariffs.

OWL is not certain that the Commission will assert its exemption authority in an area in which Congress has spoken directly.

The following excerpt from the remarks of Commissioner (then Chairman) Creel before the Propeller Club of Los Angeles – Long Beach on January 27, 1999 sets out the issue concisely:

> A specific change in OSRA that does not receive a great deal of attention involves the Commission's general exemption authority. The Commission is authorized, upon its own motion or if petitioned, to exempt any activity within its jurisdiction from specific regulatory requirements if certain criteria are satisfied. OSRA eliminates two of the present four prongs of the exemption criteria. That is, the Commission no longer must examine whether a specific exemption would impair effective regulation or result in unjust discrimination. Now, the Commission is permitted to exempt any activity upon a showing that the exemption will not substantially reduce competition or otherwise be detrimental to commerce. Those are the only two criteria the statute dictates must be considered.
>
> Our proposed rule to implement this important change was relatively easy to draft. We merely removed the two eliminated exemption criteria and moved the entire rule to a more appropriate location. But what bears mentioning is the impact this statutory change can have on the future administration of our exemption authority.
>
> The legislative history for the present and earlier exemption provisions suggested that the FMC's authority was intended to be exercised in narrowly-described circumstances that would have minimal effect on foreign commerce. And the Commission on more than one occasion has interpreted the statute as not providing the authority to repeal or substantially amend the general statutory scheme established by Congress. OSRA's legislative history is not dissimilar. It indicates that Congress has identified and addressed those broad areas deserving reduced regulation, and left to the Commission specific regulatory provisions and practices, not

> yet addressed by Congress, for consideration of further deregulation. Nonetheless, with OSRA's relaxation of the statutory test, the Commission will need to assess just how it legally and commercially should examine future exemption matters.[16]

The possibility exists, therefore, that the Commission might recognize the need to address the competitive dysfunctions in the marketplace described above (and in the UPS and NCBFA Petitions) but will feel constrained about utilizing its exemption authority in areas that have been so specifically examined by Congress. It is with this understanding that OWL submits the following proposal to expand the use and definition of special contracts. The proposed new rules set out below will serve the following purposes:

1. It will enable the Commission to promulgate regulations in an area that has not been examined directly by Congress;
2. It will enable all NVOCCs, regardless of their size or investment in transportation infrastructure, to shield some of their pricing mechanisms from their competitors without recourse to the use of confidential service contracts;
3. It will facilitate the continuing oversight of NVOCC rate activities by the Commission's Bureau of Enforcement by requiring all NVOCC special contract (or Special Billing Instruction rates as the term is used below) tariff filings to be available to the Commission in the same manner as exists today for regular NVOCC tariff rates; and
4. It will enable each shipper, even those that route its cargo via OTIs, to shield the ocean rate segment of its supply chain from its competitors.

[16] http://www.fmc.gov/Speeches/Creel/SPPropeller.htm

OWL therefore proposes that the rules governing "special contracts" be amended as follows:[17]

§ 515.2 Definitions.

The terms used in this part are defined as follows:

(k) *Licensee* is any person licensed by the Federal Maritime Commission as an ocean transportation intermediary.

(o) *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier.

(v) Special contract is a contract for ***ocean transportation intermediary*** services which provides for a periodic lump sum fee for freight forwarding services ***or special billing instruction for common carrier services performed by NVOCCs that contains a componentfor ocean freight rates.***

§ 515.33 Records required to be kept.

Each licensed freight forwarder shall maintain in an orderly and systematic manner, and keep current and correct, all records and books of account in connection with its forwarding business. These records must be kept in the United States in such manner as to enable authorized Commission personnel to readily determine the licensed freight forwarder's cash position, accounts receivable and accounts payable. The licensed freight forwarder may maintain these records in either paper or electronic form, which shall be readily available in usable form to the Commission; the electronically maintained records shall be no less accessible than if they were maintained in paper form. These recordkeeping requirements are independent of the retention requirements of other federal agencies. The licensed freight forwarder ***or NVOCC with regard to rates filed in its tariff pursuant to special billing instructions described*** in ***section (d)(ii)*** must maintain the following records for a period of five years:

(a) *General financial data.*

(b) *Types of services by shipment.*

(c) Receipts and disbursements by shipment.

(d) *Special contracts.* (i) A true copy, or if oral, a true and complete memorandum, of every special arrangement or contract between a licensed freight forwarder and a principal, or

[17] The proposed changes set out below are intended to set out a framework for discussion for the Commission and any party submitting comments. They are not intended to be exhaustive but are set out in sufficient detail to enable the Commission to understand that revision to these rules may be a viable means to redress the competitive concerns of OTIs.

modification or cancellation thereof. ~~*Bona fide* shippers shall also have access to such records upon reasonable request.~~ ***(ii) A true copy of the ocean freight charges applicable under the terms of an NVOCC special billing instruction must be filed and maintained in the same manner as any other published rates in the NVOCC's tariff except that rates filed subject to Special Billing Instructions may be maintained in a section of the NVOCC's tariff that is not subject to review or access by the shippingpublie. Rates maintained in this section of the NVOCC's tariff must reference a specific agreement between the NVOCC and a shipper, consignee or other authorized user of said rate. The ocean freight rate component of any NVOCC Special Billing Instruction shall not be subject to any minimum volume commitment. The Commission or any duly authorized U.S. agency or department may also access the special billing instructian section of the NVOCC's tariff in a manner proscribed by the Commission.***

§ 515.41 Forwarder and principal; fees.

(a) *Compensation or fee sharing.* No licensed freight forwarder shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, or purchaser, or an agent, affiliate, or employee thereof; nor with any person advancing the purchase price of the property or guaranteeing payment therefore; nor with any person having a beneficial interest in the shipment.

(b) *Receipt for cargo.* Each receipt for cargo issued by a licensed freight forwarder shall be clearly identified as "Receipt for Cargo" and be readily distinguishable from a bill of lading.

(c) ~~*Special contracts.* To the extent that special arrangements or contracts are entered into by a licensed freight forwarder, the forwarder shall not deny equal terms to other shippers similarly situated.~~

The Commission would also need to issue a minor revision to 46 C.F.R. Part 520 as follows:

§ 520.13 Exemptions and exceptions.

(a) *General.* Exemptions from the requirements of this part are governed by section 16 of the Act and Rule 67 of the Commission's Rules of Practice and Procedure, § 502.67 of this chapter.

. . .

(e) Ocean Freight Rates issued pursuant to NVOCC Special Billing Instructions are exempt from the provisions of 46 C.F.R. § 520.9(e) (1) except to the extent that all such rates must remain publicly available to the Commission, to any duly authorizedfederal agency, or to the underlying shipper or any other party on whose behalf those rates are filed. This exemption is limited specifically to rates reduced to a writing between an NVOCC and a specific shipper(s), consignee(s), or their duly

authorized agents. Any NVOCC bill of lading ratedpursuant to a special billing instruction must indicate the applicable special billing instruction tariff item number pursuant to which the cargo is rated.

V. DISCUSSION

A. THE PROPOSED REVISIONS TRACK THE COMMERCIAL MODEL USED BY FREIGHT FORWARDERS/NVOCCS IN THE NON-CONTINGUOUS DOMESTIC TRADE REGULATED BY THE SURFACE TRANSPORTATION BOARD

The proposed revisions would more closely align OTI practices in the foreign waterborne commerce of the United States with those utilized by freight forwarders in the non-contiguous domestic trade regulated by the Surface Transportation Board ("STB").

Freight forwarders" in the non-contiguous domestic trade (trade between the U.S. mainland and Hawaii, Guam, Alaska, and Puerto Rico) are exempt from tariff filing requirements. *See Exemption of Freight Forwarders in the Noncontiguous Domestic Trade From Rate Reasonableness and Tariff Filing Requirements,* STB Ex Parte No. 598 (February 21, 1997). A brief review of the STB's decision in this regard is instructive."

The STB asserted that the "DOT views as an anachronism the provision of the ICCTA that imposes tariff tiling requirements on forwarders in the noncontiguous domestic trades." The STB went on to point out that "forwarding services are highly competitive, that the market is easily entered, that the public interest has been well-served during the last 10 years by an approach that did not require any tariff filing by ICC-regulated forwarders, and that the removal of the tariff filing requirement for noncontiguous domestic trade shipments would enhance competition and transportation efficiency. *Id.*

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[18] The terms "freight forwarder" and "NVOCC" are interchangeable for regulatory purposes at the STB. See *Ex Parte No 598.*

[19] OWL is not requesting a blanket exemption from the tariff filing requirements of the Shipping Acts. However, the STB's discussion of its reasoning does track the reasoning underlying the instant Petition.

Two VOCCs (or Water Carriers using STB terminology) in the Puerto Rican trades, NPR, Inc. and Crowley, argued against the exemption on the ground that “exempting freight forwarders would create an uneven playing field between freight forwarders and water carriers, because freight forwarders would have full knowledge of water carriers’ rates in light of the tariff filing requirement, but water carriers would not have similar knowledge of freight forwarder rates.” Id. The STB concluded that because VOCCs have the same ability to enter into contracts under 49 U.S.C. § 14101, an exemption would not put the VOCCs in an unfair competitive position.

It is more than a bit ironic that water carriers that opposed the tariff exemption did so on the grounds that a transparent/opaque rate dichotomy would cause them competitive harm. The STB observed correctly that no such advantage would be gained by virtue of the exemption because both VOCCs and forwarders had the ability to enter into confidential rate contracts.

The STB concluded that the noncontiguous domestic trade freight forwarder industry is highly competitive and the elimination of tariff filing would eliminate an unnecessary financial burden, Furthermore, to “the extent that the exemption affects the rates and services offered to the public, we expect that the reduced burden will result in lower rates and additional competition.”

The STB’s decision is relevant to the Commission’s review of the OWL Petition. The international OTI industry is no less competitive, and may be more so, than the noncontiguous domestic trade. The fact that water carriers in the domestic offshore trade expressed concern about rate transparency subsequent to the proposed exemption validates OWL’s assertion that maintaining similar levels of rate transparency (or non-transparency) is a pro-competitive undertaking. Further, after a thorough, regulatory review of competition in the forwarding industry, the STB determined that its actions would result in lower rates and additional competition. OWL has every reason to believe that its proposed rules would, if promulgated, have a similar result in the foreign water borne commerce of the United States.

Despite the STB's exemption, many ocean freight forwarders in the dmoestic trade still file and maintain publicly available tariffs. This enables those forwarders to maintain some consistency in their rate offerings and in the rules governing their shipments. However, most freight forwarders establish special non-tariff rates for their shippers, particularly their volume shippers. These rates, often referred to as Special Billing Instructions, memorialize the price relationship between the forwarder and an individual shipper. Competition amongst forwarders is intense in these trades as is competition between water carriers and forwarders. Consequently, those special billing instructions are kept confidential and not disclosed to any party other than to those entitled to use them.[20]

Therefore, when one forwarder or water carrier seeks to obtain large-volume business from one of its competitors they do not enjoy a competitive advantage when it comes to knowledge of the price relationship between the competitor and its shipper. Consequently, water carriers and forwarders competing for cargo must do so without having the advantage of prior knowledge of the rates governing the existing relationship. This is a pro-competitive structure and both VOCCs and NVOCCs are compelled to negotiate up from their own costs rather than down from a publicly available "sell rate".

Water carriers continue to enjoy competitive advantages in these trades. As is the case in the foreign commerce of the Untied States, water carriers own vessels, and own or lease containers and chassis that are available throughout the world. These advantages redound to the

[20] It is OWL's knowledge of commercial practices in the noncontiguous domestic offshore trade that leads them to draw a parallel between special billing instructions as used by domestic forwarders and the special contracts provisions discussed above.

benefit of water carriers when they compete for business controlled by forwarders. However, these advantages are not compounded further by an imbalance in rate knowledge. In other words, water carriers are forced to compete using the commercial tools at their disposal, which are numerous, but are not provided with additional competitive weapons by means of the regulatory regime. This is a result that can and should be emulated by the Commission.[21]

B. NVOCC SPECIAL BILLING INSTRUCTIONS WOULD BE SEPARATE AND DISTINCT FROM VOCC SERVICE CONTRACTS

As conceived by OWL, NVOCC special billing instructions would be a separate and distinct entity from service contracts. The OWL proposal does not provide for MVCs and consequently does not provide a mechanism for liquidated damages.[22] This recognizes the different economic investments between VOCCs and NVOCCs. VOCCs are compelled, in part, to seek MVCs because of their need to pre-sell as many slots as possible on their vessels. VOCCs are obligated to meet their fixed costs of each voyage without regard to the number of slots they fill.[23]

As discussed above, NVOCCs are not in the same position as VOCCs viz their fixed costs. To the extent that they operate pursuant to standard service contracts with VOCCs, NVOCCs are not obligated to load any set amount of containers on any given voyage. They only incur costs for containers they book and deliver. Special billing instructions would enable an NVOCC to set a fixed, shielded rate for its customers but would not provide the NVOCC with

[21] OWL does not expect that the Commission will issue a tariff exemption for NVOCCs in the same manner as the STB even though the STB found that the level of forwarder competition was sufficient to ensure that forwarder pricing would not impact negatively on the marketplace. Enabling special billing instructions in the manner set out by OWL could achieve a similar competitive result even absent a broad tariff filing exemption.
[22] OWL suggests that MVCs could be permitted but only to the extent that an NVOCC can guarantee space on board vessels by means of slot charter or service contracts with guaranteed space provisions. For purposes of this Petition, however, OWL is proposing a rule that maintains significant differences between a service contract and special billing instruction.
[23] Liquidated damage provisions are designed to mitigate the economic loss suffered by a VOCC arising out of the non-utilization of capacity if a shipper does not provide the VOCC with the agreed upon volume of containers.

the pre-booking space commitment provided to VOCCs under service contracts.[24] This preserves the distinction in cost-economics between the two entities, provides the NVOCC with less of a volume commitment than is available by means of a service contract with a MVC but enables the NVOCC to shield from public view the rates it offers to its regular customers who agree to move cargo pursuant to these special billing instructions.

The absence of MVCs also preserves the competitive advantage maintained by VOCCs based upon their ability to secure and guarantee space on vessels. As long as NVOCCs do not charter slots or otherwise secure space with their own guaranteed service contract, this advantage is one legitimately derived by the VOCC's investment in vessels or slots. Therefore, to the extent VOCCs claim that this distinction has meaning, it will play itself out in the marketplace but without the unfair advantage provided by the ongoing transparent/opaque rate dichotomy.[25]

By maintaining the difference between a service contract and a special contract (or special billing instruction) the Commission will avoid acting in an area that has been addressed directly by Congress. Further, it will more closely align the regulatory regimes under which OTI operate in the domestic and foreign ocean borne commerce of the United States.

C. ALL OCEAN- FREIGHT RATES CONTAINED IN SPECIAL BILLING INSTRUCTIONS WOULD BE FILED IN THE NVOCC'S TARIFF AND WOULD AND BE FREELY AVAILABLE TO THE COMMISSION AND THOSE SHIPPERS UTILIZING THOSE RATES

As envisioned by OWL, the ocean freight rates set out in special billing instructions would be maintained and filed in exactly the same manner and fashion as any other rate in its tariff. The only difference between a regular NVOCC tariff rate and a special billing instruction tariff rate will be the placement of the special billing rate in a section of the tariff that is not

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[24] In practice, individual service contracts might not contain per-vessel volume commitments. However, when taken together, the VOCC can project or estimate capacity levels over time.

[25] One would hope that if VOCCs actually believe that they enjoy these significant advantages then they will not be opposed to competing for shipper business without recourse to their competitors' "sell rates".

publicly available except to the shipper, the Commission or any other authorized federal agency.[26]

OWL is cognizant of the fact that the Commission, specifically its Bureau of Enforcement, is obligated to oversee and monitor OTI activity to ensure compliance with the current statutory and regulatory regime. OWL's proposal is designed to facilitate that oversight.

A revision to the rules as proposed by OWL would not hinder the Commission's oversight of NVOCC or OTI activities. All shipments moving pursuant to a special billing instruction would be duly filed in the NVOCC's tariff and any bill of lading issued pursuant to an agreed upon rate would contain the applicable tariff item number. The Commission's ability to ensure that cargo is properly described and rated would remain unchanged from the current structure. The Commission would be able to match cargo descriptions and tariff filings in exactly the same manner as exists today. In fact, the ability of the Commission to oversee NVOCC special billing instructions would be less burdensome than for service contract filings of voccs.

[26] This 1s easily accomplished as a techmcal matter.

D. SPECIAL BILLING INSTRUCTIONS WOULD NOT REQUIRE AN EXEMPTION FROM THE TARIFF FILING REQUIREMENTS OF THE SHIPPING ACT BUT WOULD REQUIRE A PARTIAL EXEMPTION FROM THE PUBLIC AVAILABLIITY REQUIREMENT GOVERNING PUBLISHED TARIFFS

OWL's petition does not necessitate an exemption from the tariff filing requirements of the Act. In fact, all special billing instruction rates would be filed in exactly the same manner and fashion as all other VOCC and NVOCCs tariff rates. Special billing instruction rate filings would be subject to the same requirements as any other tiled rate. The only difference would be in the public availability of those special billing instruction rates.

OWL does not consider this modest exemption to be as broad as a tariff filing exemption or as broad as an exemption from the service contract prohibition. Rather, OWL considers this to be a modest, pro-competitive position that will serve to benefit not only OTIs but also their shippers. Such an exemption would benefit all shippers who wish to shield their landed costs from their competitors.[27]

Shippers that route their cargo through VOCCs enjoy the ability to shield their freight rates from their competitors by use of confidential service contracts. The granting of OWL's Petition would enable shippers that route their cargo through OTIs (whether a global logistics providers or simple NVOCCs) to enjoy similar confidential treatment of a significant component of their landed costs.

It bears repeating that it is not 1949. The OTI industry has changed dramatically since the Board first launched an investigation into the practices of OTIs. Further, competition amongst OTIs is so intense that concern over distorted pricing mechanisms in OTI special billing instructions should be rather muted. Given the evolution of the industry since 1949, and the

[27] The issue of confidentiality extends well beyond the ocean portion of any move and is driven by issues larger than VOCC/VOCC or VOCC/NVOCC competition.

intense nature of competition for shipper business, shielding special billing instruction rates would enhance competition in the marketplace, would enable NVOCCs to shield some but not all of their price mechanisms from their competitors, and further enable all shippers to shield significant components of their cost factors from view by their competitors. The modest exemption proposed by OWL as a component of a rulemaking will have a pro-competitive effect on the marketplace and would draw the Commission's regulations governing OTIs a bit closer to the 2 1 st century.

E. THE COMPRESSION OF THE DISTINTCION BETWEEN NVOCCS AND FREIGHT FORWARDERS BY OSRA SUPPORTS AN EXPANDED DEFINITION OF THE RULES GOVERNING OTIs

The legislative history of OSRA supports an expanded definition of the term special contracts. As noted, the OTI industry has evolved dramatically since passage of the 1984 Act. At that time, ocean freight forwarders and NVOCCs were considered separate and distinct entities and that distinction was reflected in a clear demarcation between the definition of NVOCC and ocean freight forwarder created by the 1984 Act. Section 3(17) of OSRA now "consolidates the definitions of 'ocean freight forwarder' and 'NVOCC' into a single definition of 'ocean transportation intermediary'." Senate Report No. 105-61 (July 3 1, 1997), 1997 WL 441767 (Leg.Hist.) at 16. The consolidation constitutes an implicit recognition by Congress of the transformation of two discrete ocean service providers into a broader category or providers capable of offering a full range of integrated logistics services.

The Commission has disagreed with this contention. Immediately after enactment of *OSRA,* the NCBFAA filed the *Petition of National Customs Brokers & Forwarders Association of America For Issuance of a Rulemaking or, in the Alternative, For a Declaratory Order,* (P5-98), to address the scope of the term "shipper" as defined in section 3(21) of the Shipping Act of

1984 as amended. In denying the Petition the Commission held (Commissioner Moran dissenting):

> Neither the commercial desirability of confidentiality for export transactions in the industries or the nature of sales transactions posited by NCBFAA justifies a departure from longstanding statutory requirements, unchanged by OSRA, that the participation of ocean transportation intermediaries in shipping transactions be transparent. Congress' election to maintain the distinction between ocean freight forwarders and NVOCCs at the same time that it included both in the newly-defined term "ocean transportation intermediary" or "OTI" argues strongly against NCBFAA's Petition.

Order Denying Petition, (July 16, 1999), http://www.fmc.gov/Dockets/P5-98.htm

OWL respectfully believes that the Commission misconstrued Congress' intent. Senate Report 105-61 contains the following passage:

> The Committee understands that ocean transportation arrangements are made through a diverse group of intermediaries. Some fit the description of either an ocean freight forwarder or an NVOCC; some perform both functions for different shipments. The Committee also recognizes that some countries used the term "freight forwarder" to include what the 1984 Act defines as NVOCC functions, while many U.S. NVOCCs prefer to be identified by that unique U.S. term. The substitute amendment changed this overarching term from "ocean freight forwarder" to "ocean transportation intermediary" in recognition of the above concerns. The new definition retains the terms "ocean freight forwarder" and "NVOCC" for commercial use by those entities that perform those narrow functions and prefer to be known by the existing term for commercial business reasons, while providing a single, new term, to describe the entities that provide the wider variety of service.

S. Rep. 105-61 at 17.

It is clear, at least to OWL, that the distinctions between ocean freight forwarders and NVOCCs were maintained for the commercial use of those entities that prefer to hold themselves out using a familiar term, It is also clear, as a corollary matter, that Congress did not intend that the maintenance of the ocean freight forwarder/NVOCC distinction be thought of as a means to maintain OTI transparency in shipping transactions. Rather, discussions concerning service contract rights for NVOCCs focused on the question as to whether parties that did not own or operate vessels and did not control slots on vessels should be allowed to enter into service contracts with beneficial shippers.[28] Attention was not focused on the issue of rate transparency.

The blurring of the distinction between NVOCCs and freight forwarders under the rubric of OTI supports an expansion of those special contract provisions currently limited to freight forwarders. It reflects the evolution of these separate and distinct entities into a significant component of the field of logistics.

F. THE ABILITY TO SHIELD NVOCC RATES FROM ITS COMPETITORS WOULD AMELRIOATE MOST OF THE HARM CAUSED BY THE TRANSPARENT/OPAQUE RATE DICHOTOMY WITHOUT UPSETTING THE STATUTORY SCHEME CREATED BY CONGRESS AND WILL ENABLE NVOCCs TO BETTER FOCUS ON MARKETPLACE ISSUES RATHER THAN ON EFFORTS TO END VOCC ANTITRUST IMMUNITY

It belabors the obvious to note that the OTI industry remains aggrieved by its ongoing inability to shield some portions of their rates from their competitors, be they VOCCs or other NVOCCs. Attention has long focused on the inability of NVOCCs to enter into confidential service contracts with their shipper customers and the competitive imbalance caused by that inability. OTIs have long argued that their inability to enter into service rights is compounded by the ongoing grant of antitrust immunity for discussion agreements and vessel sharing agreements. As a result of their failure to obtain service contract rights, OTIs have focused a good deal of time and attention on the competitive imbalance created by the maintenance of antitrust immunity.

Beneficial shipper interest in the immunity issue has abated since the enactment of OSRA. In fact, the principal compromise underpinning OSRA was the maintenance of antitrust

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[28] The time and attention spent by UPS on its investment m transportation related infrastructure seems designed to rebut those very arguments.

immunity counterbalanced by the provision for confidential service contracts. OTI attempts to eliminate antitrust immunity have so far been unavailing. Nevertheless, ongoing efforts in this regard by OTIs in the United States and increasing pressure on VOCC agreements of every sort originating in the European Union serve to keep the issue in play.

VOCCs have argued that antitrust immunity is essential to their ability to enter into space sharing and capacity agreements. They have further argued that the continuing grant of antitrust immunity is not the cause of the competitive harm suffered by OTIs as a result of the current regulatory regime. The VOCCs may be right in that regard.

OWL acknowledges that the growth of VSAs and other similar agreements have created greater efficiencies in VOCC operations. Certainly, these efficiencies facilitate VOCCs' continuing ability to drive unnecessary costs out of their operations. OWL also acknowledges that the end of immunity might ignite a wave of mergers that will serve to accomplish the same efficiencies while at the same time driving some competition out of the trade.

OWL further acknowledges that the provision of antitrust immunity is not necessarily the prime causative factor in the competitive harm suffered by OWL and other OTIs in the current regulatory regime. VOCCs must also understand, however, that the ongoing examination of antitrust immunity is the only means that NVOCCs have to keep the issue of competitive harm alive.

OWL speaks only for itself but it is of the opinion that if the Commission takes steps to ameliorate the competitive harm caused by the transparent/opaque rate dichotomy, the OTI industry will be more likely to focus its attention on growing their business and less attention attacking the statutory regime under which VOCCs currently operate. Simply put, Owl would expect that OTI attention on antitrust immunity would track that of beneficial shippers subsequent to OSRA.

VI. CONCLUSION

The term special contracts, having its roots in the deep recesses of the Commission's history, is an admittedly anachronistic regulatory mechanism known to few and understood by even fewer. OWL respectfully urges the Commission to revitalize this anachronistic mechanism and by so doing enable NVOCCs, whether large or small, to compete commercially for cargo without being burdened by the competitive disadvantages caused by their inability to shield their price mechanisms from their competitors.

Further, "Congress has identified and addressed those broad areas deserving reduced regulation, and left to the Commission specific regulatory provisions and practices, not yet addressed by Congress, for consideration of further deregulation."[29] The Commission has both the authority and the flexibility to address the issues set out by OWL in the instant petition. The remaining question is one that only the Commission can answer: Does the Commission have the desire to effectuate change that will produce a more competitive environment for all participants in the industry?

For the foregoing reasons, OWL requests that the Commission institute a rulemaking designed to allow the OTI/logistics industry to participate in the development of new rules governing OTIs that reflect the changes in the industry since 1949 when these rules were first

[29] http://www.fmc.gov/Speeches/Creel/SPPropeller.htm

promulgated and take into account the evolving role and function of OTIs in the international supply chain.

Respectfully submitted,

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September 8, 2003

VERIFICATION

Leonard L. Fleisig, being duly sworn, deposes and says that he has read the foregoing statement and knows the contents thereof, and that the same are true and correct as stated.

Leonard L. Fleisig

Subscribed to and sworn to
Before me the 8th day of
September, 2003

Notary Public

My Commission Expires November 14, [illegible]